SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

FILED
MAY 3 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1563

In the Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO. INC. AND
MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

ROSALIND C. COHEN
Assistant General Counsel

RUTH E. EISENBERG
Special Counsel

PAMELA T. PARRISH
RICHARD A. LEVINE
Attorneys
Securities and Exchange Commission
Washington, D.C. 20549

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners' claims for injunctive and declaratory relief challenging a formal administrative order of investigation became moot when the order was terminated.

2. Whether the district court abused its discretion in denying petitioners' motion for relief from judgment under Fed. R. Civ. P. 60(b)(6).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Ackermann v. *United States*, 340 U.S. 193 9

Ashcroft v. *Mattis*, 431 U.S. 171 6

Butz v. *Economou*, 438 U.S. 478 5

Haring v. *Prosise*, 462 U.S. 306 7

Harlow v. *Fitzgerald*, 457 U.S. 800 5

Link v. *Wabash R.R.*, 370 U.S. 626 9

Mekdeci v. *Merrell National Laboratories*, 711 F.2d 1510 9

Murphy v. *Hunt*, 455 U.S. 478 6

Polk County v. *Dodson*, 454 U.S. 312 9

Preiser v. *Newkirk*, 422 U.S. 395 6

Ramirez v. *INS*, 550 F.2d 560 9

SEC v. *Arthur Young & Co.*, 584 F.2d 1018, cert. denied, 439 U.S. 1071 8

SEC v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 9

Page

Cases—Continued:

SEC v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984) 3, 6, 8

SEC v. *Sloan*, 436 U.S. 103 7

Sprecher v. *Graber*, 716 F.2d 968 6

Steadman v. *SEC*, 450 U.S. 91 9

Wainwright v. *Torna*, 455 U.S. 586 9

Watson v. *Moss*, 619 F.2d 775 9

Constitution, statutes, regulations and rule:

U.S. Const.:

Art. III 7

Amend. IV 7

Amend. VI 9

Securities Act of 1933, § 17(a), 15 U.S.C. 77q(a) 2

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:

§ 10(b), 15 U.S.C. 78j(b) 2

§ 15(b), 15 U.S.C. (& Supp. I) 78*o*(b) 6

§ 15(c), 15 U.S.C. 78*o*(c) 2

§ 21(c), 15 U.S.C. 78u(c) 6

§ 25(a), 15 U.S.C. 78y(a) 6

42 U.S.C. 1983 7

Page

Constitution, statutes, regulations and rule—Continued:

17 C.F.R. :

Section 200.30-4(a)(1) 5

Section 202.5 5

Section 240.10b-5 2

Section 240.10b-6 2

Section 240.10b-9 2

Section 240.15c2-4 2

Fed. R. Civ. P. 60(b)(6) 3, 4, 8

Miscellaneous:

L. Loss, *Fundamentals of Securities Regulation* (1983) 9

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1563

BLINDER, ROBINSON & CO. INC. AND
MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 748 F.2d 1415. The opinion of the district court and order granting summary judgment (Pet. App. 12a-18a) are reported at 565 F. Supp. 74. The order of the district court denying petitioners' motion under Fed. R. Civ. P. 60(b)(6) (Pet. App. 19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1984. A petition for rehearing was denied on January 2, 1985. The petition for a writ of certiorari was filed on April 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Blinder, Robinson & Company (Blinder, Robinson) is a broker-dealer registered with the Securities and Exchange Commission. Petitioner Meyer Blinder is Blinder, Robinson's president and principal shareholder. Pet. App. 12a-13a. On August 27, 1980, the Commission brought a civil enforcement action in the United States District Court for the District of Colorado, charging that petitioners and others had violated antifraud and anti-manipulation provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations thereunder in connection with a $25 million public offering of securities of American Leisure Corporation, a new issuer with no operating history (Pet. App. 2a).[1] In their answer to the Commission's complaint, petitioners alleged as an affirmative defense that the Commission's case resulted from an illegal investigation (*id.* at 14a n.2). The Commission's enforcement action was tried in July 1981 (*id.* at 14a). Petitioners did not seek to introduce any evidence relating to their purported illegality defense, nor did they object to the Commission's introduction of any evidence derived from its investigation (*id.* at 3a, 14a).

The district court found that petitioners had violated each of the charged provisions and enjoined them from further violations. The court of appeals affirmed in all respects, and this Court denied certiorari. 542 F. Supp. 468 (D. Colo. 1982), aff'd, 748 F.2d 1415 (10th Cir. 1984), cert. denied, No. 84-649 (Jan. 7, 1985).

---

[1]The complaint charged violations of the following provisions: Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 10(b), 15(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78*o*(c); and Rules 10b-5, 10b-6, 10b-9, 15c2-4, 17 C.F.R. 240.10b-5, 240.10b-6, 240.10b-9, 240.15c2-4.

2. Twelve days before the Commission brought its enforcement action, Blinder, Robinson filed suit against the Commission in the same district court, challenging the agency's formal order of investigation that led to the enforcement action. The formal order (Pet. App. 20a-22a) authorized Commission staff to issue subpoenas during the course of their investigation of petitioners, but the order did not itself compel petitioners to disclose any information or to produce any documents. See generally *SEC* v. *Jerry T. O'Brien, Inc.*, No. 83-751 (June 18, 1984), slip op. 1-2 n.1. After the enforcement action was initiated, the district court dismissed Blinder, Robinson's action on the ground that it was moot. See Pet. App. 13a-14a. The court of appeals reversed, concluding that the action was not moot because the order of investigation was still in effect, and remanded to the district court for further proceedings. 692 F.2d 102, 106 (10th Cir. 1982).

On remand, Meyer Blinder joined the action, and petitioners amended their complaint to seek damages from unnamed officers and agents of the Commission as well as an injunction against the Commission's use of unconstitutional formal orders to investigate petitioners and a declaration that the order at issue exceeded the Commission's constitutional and statutory authority (Pet. App. 14a-15a). The district court granted summary judgment in favor of the Commission (*id.* at 12a-18a), reasoning that petitioners were collaterally estopped by their failure to pursue their challenge to the legality of the Commission's investigation in the enforcement action (*id.* at 17a-18a). Petitioners appealed (C.A. No. 83-2041).

3. While their petition for rehearing in the enforcement action was pending in the court of appeals, petitioners moved in the district court under Fed. R. Civ. P. 60(b)(6) for relief from the judgment in that action entered against them 19 months earlier. The sole basis for their motion was

the asserted gross negligence of their counsel in not objecting to the admission of allegedly tainted evidence at trial. The district court denied the motion (Pet. App. 19a). Based on the records of the trial of the enforcement proceeding and petitioners' action against the Commission, the district court concluded that petitioners "were vigorously represented by competent and experienced lawyers who made a tactical decision which binds their clients" (*ibid.*). Petitioners appealed (C.A. No. 84-1483).

4. The court of appeals consolidated the two appeals and affirmed both judgments (Pet. App. 1a-11a).

a. With respect to petitioners' challenge to the Commission's investigation, the court held that their claims for declaratory and injunctive relief had become moot because the formal order of investigation was terminated in September 1982: "[w]hen the investigatory order terminated, there no longer existed a substantial controversy of sufficient immediacy and reality to justify the issuance of a declaratory judgment because the SEC could no longer investigate Blinder, Robinson under that order" (Pet. App. 6a). The court determined (*ibid.* (citation omitted)) that no live controversy exists as to any future investigation of petitioners by the Commission because " 'there is no reasonable expectation that the alleged wrongs will be repeated.' "[2] The court also concluded (*id.* at 7a) that petitioners had not sufficiently stated a claim for damages for alleged constitutional violations by unnamed Commission employees.

b. In affirming the denial of petitioners' Rule 60(b)(6) motion, the court of appeals agreed with the district court

---

[2]Contrary to petitioners' characterization (Pet. 3, 10), the formal order has never been adjudicated "illegal"; indeed, when petitioners had the opportunity to seek such an adjudication in the enforcement action, they failed to do so.

that petitioners were bound by the tactical decision of their competent counsel (Pet. App. 11a). The court of appeals reasoned that even if trial counsel had been negligent in failing to object to the Commission's allegedly improper evidence, "this would not constitute a sufficient showing to warrant the extraordinary relief" of setting aside the judgment (*id.* at 10a).

ARGUMENT

The decision of the court of appeals rejecting petitioners' factbound claims is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' contentions, which mischaracterize the law and the facts, do not merit further review.

1. The court of appeals correctly applied settled law to the facts of this case in holding (Pet. App. 5a-6a) that petitioners' claims for injunctive and declaratory relief with respect to the Commission's formal order of investigation became moot after the order had been terminated.[3] When the Commission terminated the order in 1982, it was no longer of any effect—the Commission's staff could no longer issue subpoenas or take other investigatory action pursuant to the order. See generally 17 C.F.R. 200.30-4(a)(1), 202.5. Accordingly, an injunction or declaration with respect to the order could not now benefit petitioners —in particular, it could not relieve them of the injunction imposed in the enforcement action, where they raised no

---

[3]The court of appeals also correctly affirmed (Pet. App. 7a) the dismissal of petitioners' *Bivens* claim for their failure to plead specific facts supporting a constitutional claim for damages. Petitioners' mere reference (Pet. 13 n.15) to the breadth of the formal order hardly suffices to show its unconstitutionality or the other elements of the cause of action. See generally *Harlow* v. *Fitzgerald*, 457 U.S. 800, 808 (1982); *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978). Petitioners' conclusory argument to the contrary raises no issue worthy of further review.

objection to the introduction of evidence obtained in the course of the Commission's investigation. In the absence of an immediate, real controversy in which the parties have an actual, personal interest, petitioners' action is moot. See, *e.g., Murphy* v. *Hunt,* 455 U.S. 478, 481-482 (1982); *Ashcroft* v. *Mattis,* 431 U.S. 171, 172 (1977); *Preiser* v. *Newkirk,* 422 U.S. 395, 402 (1975).[4]

This case does not fit within the exception to the requirement of a live controversy for those claims " 'capable of repetition, yet evading review' " (*Murphy* v. *Hunt,* 455 U.S. at 482 (citation omitted)). First, as the court of appeals noted (Pet. App. 5a-6a), any future illegality is unlikely because it is presumed that administrative agencies such as the Commission will act within the law. Moreover, as the court also stated (*id.* at 6a), petitioners have alleged no facts supporting their bare allegation that the Commission will violate their rights in the future. Finally, and most fundamentally, the issue, if it arises in the future, will not evade review. Because the Commission's subpoenas are not self-enforcing (*Jerry T. O'Brien, Inc.,* slip op. 5), petitioners may obtain judicial review by refusing, for good cause, to comply with any subpoena directed to them, thereby forcing the Commission to bring a subpoena enforcement action (see 15 U.S.C. 78u(c)). In such an action, petitioners could challenge the legality of the subpoena and underlying investigation. See generally *Sprecher* v. *Graber,* 716 F.2d 968, 975 (2d Cir. 1983) (subpoena enforcement proceeding is exclusive avenue for testing validity of Commission

---

[4]Petitioners recently have sought to challenge the terminated formal order in a Commission administrative proceeding brought pursuant to 15 U.S.C. (& Supp. I) 78*o*(b) based on the injunction entered by the district court in the enforcement action and on the underlying facts (Pet. App. 23a-37a). As the court of appeals noted (*id.* at 11a), petitioners may seek judicial review of any final adverse decision in the administrative proceeding. See 15 U.S.C. 78y(*a*).

subpoena). Indeed, petitioners could have adopted this approach in connection with this very investigation when the Commission issued subpoenas to them. Having failed to assert their claims when there was a live controversy,[5] they have no right to do so now when the issue has been mooted by termination of the challenged order.[6]

This Court's decision in *Haring* v. *Prosise*, 462 U.S. 306 (1983), relied on heavily by petitioners (Pet. i, 11-13), is completely inapposite. In *Haring*, the Court held that a criminal defendant's plea of guilty (and consequent failure to challenge the legality of a search) did not collaterally estop him from maintaining a subsequent action for damages under 42 U.S.C. 1983 based on the alleged unconstitutionality of the search under the Fourth Amendment. *Haring* has nothing to do with mootness, and surely does not stand for the proposition that Fourth Amendment challenges are somehow exempt from the Article III requirement of a live controversy.[7]

---

[5]The conflict among the circuits noted by petitioners (Pet. 15-16) with respect to whether compliance with a subpoena renders moot a challenge to the subpoena is irrelevant to the instant case, where petitioners failed to challenge any Commission subpoena.

[6]Petitioners' reliance (Pet. 15) on *SEC* v. *Sloan*, 436 U.S. 103 (1978), is decidedly misplaced. In that case, the Commission had "tacked" consecutive ten-day suspension orders, thus continuously suspending trading in a company's stock. Although at the time of review no suspension order was in effect, the Court held that the challenge was not moot because each order's duration was too short to allow full judicial review and because there was a reasonable expectation that the same party would be subject to the same action in the future (*id.* at 109). Neither factor is present here.

[7]In any event, petitioners' constitutional claim (see Pet. 17-20) is meritless. Petitioners erroneously equate the Commission's formal order with a search or with a warrant or subpoena that itself compels disclosure of information or production of documents. In fact, a formal order merely authorizes the Commission staff to issue subpoenas during an investigation; these subpoenas, much less formal orders, cannot compel a person to do anything because they are not self-enforcing

2. Petitioners' argument (Pet. 20-24) that the district court abused its discretion in denying their Rule 60(b)(6) motion is without merit. The gravamen of that motion was that petitioners' trial counsel had been grossly negligent in not objecting to the admission of "tainted evidence" at the trial of the Commission's enforcement action. The conclusion of both courts below that the failure to object was a calculated tactical choice is supported by petitioner Blinder's own affidavit in support of the Rule 60(b)(6) motion, which averred (paras. 9, 19) that the failure to challenge evidence at trial was a considered decision resulting from counsel's conclusion as to the proper means for challenging the investigation. Petitioners' claim that they are entitled to the extraordinary remedy of relief from judgment—a judgment whose merits this Court has already declined to review (see page 2, *supra*)—obviously does not warrant further attention.

Petitioners' belated and unsupported claim of a conflict of interest on the part of their counsel fails to demonstrate any error in the denial of their Rule 60(b)(6) motion. Petitioners assert (Pet. 24 & n.50) that the conflict surfaced when one of their trial counsel joined another brokerage firm more than two years after the trial at which the "tainted evidence" was introduced. Petitioners failed to raise this conflict claim in the district court in their Rule 60(b)(6) motion or in their opening brief on appeal, mentioning it for the first time only in a footnote in their reply brief on appeal

---

(*Jerry T. O'Brien, Inc.*, slip op. 1-2 nn.1, 5). In a subpoena enforcement action, the subpoenaed party may object on any appropriate ground. See generally *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979). Thus, contrary to petitioners' ill-founded claim (Pet. 19-20), a formal order does not give the Commission "*carte blanche* to subpoena documents and coerce testimony." The subpoena enforcement procedure guarantees that the Commission's requests for documents and testimony are subject to judicial review and to full constitutional protections.

filed on August 30, 1984. No evidence has ever been presented below in support of their argument, which was not made until one year after their former counsel's change in position. During that year, petitioners filed five submissions attacking the injunction, not one of which referred to the asserted conflict. Moreover, contrary to petitioners' suggestion (Pet. 11), the attorney in question did not present oral argument on behalf of petitioners on their appeal from the injunction. There is no basis for further review of petitioners' latest effort at avoiding the consequences of their wrongdoing. As the Court stated in *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950), "[t]here must be an end to litigation someday."[8]

---

[8]Petitioners' attempt to endow their claim with a constitutional aura is, in any event, utterly without foundation. Petitioners had no Sixth Amendment right to effective assistance of counsel because the Commission's enforcement action was civil, not criminal. See, *e.g.*, *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); L. Loss, *Fundamentals of Securities Regulation* 801 & n.7 (1983); see also *Steadman* v. *SEC*, 450 U.S. 91 (1981). See generally *Mekdeci* v. *Merrell National Laboratories*, 711 F.2d 1510, 1522-1523 (11th Cir. 1983); *Watson* v. *Moss*, 619 F.2d 775, 776 (8th Cir. 1980); *Ramirez* v. *INS*, 550 F.2d 560, 563 (9th Cir. 1977). Nor does the adequacy of petitioners' privately retained counsel implicate due process concerns, for their attorney's conduct cannot be laid at the door of the government. See *Wainwright* v. *Torna*, 455 U.S. 586, 588 n.4 (1982) (deprivation was caused by counsel, not by the state); cf. *Polk County* v. *Dodson*, 454 U.S. 312, 317-325 (1981) (public defender whose salary is paid by the state does not act "under color of state law"). The Constitution obviously does not require that civil judgments be subject to attack on grounds of inadequacy of representation by privately retained counsel. See generally *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DANIEL L. GOELZER
General Counsel

ROSALIND C. COHEN
Assistant General Counsel

RUTH E. EISENBERG
Special Counsel

PAMELA T. PARRISH
RICHARD A. LEVINE
Attorneys
Securities and Exchange Commission

MAY 1985

DOJ-1985-05